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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED
Clerk, Supreme Court, Utah

JAMES SICILIANO,
Plaintiff and Respondent,

vs.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a corporation,
Defendant and Appellant.

Case No. 9378

Petition for Rehearing and Brief

CLARENCE M. BECK
Felt Building
Salt Lake City, Utah

and

GEORGE M. McMILLAN
1020 Kearns Building
Salt Lake City, Utah
Attorneys for Petitioner

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IN THE SUPREME COURT
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Petition for Rehearing and Brief

PETITION FOR REHEARING

James Siciliano, by his attorneys, respectfully petitions the above entitled Court for a rehearing and that the decision of the Court rendered August 24 in the above entitled case be reversed upon the grounds and for the reasons as follows:

1. The Court erred in ruling that there was no evidence of negligence upon which liability could be predicated.

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2. The Court erred in substituting its interpretation of the facts for the interpretation necessarily adopted by the jury.

3. The Court erred in holding that the instruction on assumed risk constituted prejudicial error in this case.

4. The errors of the Court deprived the plaintiff of rights given to him by the statutes and Constitution of the United States.

WHEREFORE plaintiff and respondent prays that the Court make and enter its order granting a rehearing to plaintiff and respondent and reversing the decision of the Court entered herein on August 24, 1961, and reinstating the judgment of the District Court.

CLARENCE M. BECK
Felt Building
Salt Lake City, Utah

and

GEORGE M. McMILLAN
1020 Kearns Building
Salt Lake City, Utah

Attorneys for Petitioner

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ARGUMENT

POINT I

THE COURT ERRED IN SUBSTITUTING ITS VIEW OF THE FACTS FOR THAT OF THE JURY.

Specifications of error described in paragraphs 1, 2 and 4 of the petition for rehearing are treated together in this portion of the argument.

The facts in this case were susceptible to two interpretations:

1. The coil of wire was hung in a position of tension or spring with its ends held under among the strands. That such a piece of equipment is unsafe for ordinary use — that it constitutes a trap — requires no elaboration. This was the plaintiff's theory.

2. The coil of wire was hung with loose ends without tension in the manner wire is ordinarily hung in industrial plants. This was the defendant's theory.

The defendant did *not* offer evidence, as the majority implies, that the prevailing practice was to hang coils of wire in a position of spring or tension with the ends locked under or among the coils.

The jury was instructed that the hanging of a coil of wire with loose ends upon a post could not in and of itself constitute negligence (Court Instruction No. 20, R. 58), but "whether or not the manner in which this wire was hung on the post is negligence is for you to determine based upon all of the evidence and such reasonable inferences as may be drawn"

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(ibid.). Thus the jury was instructed that there could be no negligence on the defendant's theory. The jury necessarily adopted the plaintiff's theory and necessarily determined that the coil of wire in the particular circumstance of this lawsuit constituted a trap and was not a safe piece of equipment.

The United States Supreme Court has repeatedly, uniformly and pointedly held that the only question which the appellate court should review in considering whether the judgment is supported by evidence is whether the jury could find that employer negligence played any part at all in producing the injury, or stated another way, whether there is any evidence which with reason could be said to support the jury's findings. ". . . Judges are to fix their sights primarily to make that appraisal and if that test is made are bound to find that a case is made out, whether or not the evidence allows the jury a choice of other possibilities." Rogers v. Missouri R.R. Co. (1957) 352 U.S. 500, 1 L.Ed (2d) 493, 77 S. Ct. 443; rehearing denied 353 U.S. 941, 1 L.Ed (2d) 764, 77 S. Ct. 808.

One cannot read the cases following the Rogers case and have any doubt that its teaching represents the firm and considered judgment of the majority of the Court in cases of this kind.

Webb v. Illinois Cent. R. Co. (1957) 352 U.S. 512, 1 L.Ed (2d) 503, 77 S. Ct. 451; Shaw v. Atlantic Coast Line R. Co. (1957) 353 U.S. 920, 1 L.Ed (2d) 718, 77 S. Ct. 680; Futrelle v. Atlantic Coast Line R. Co. (1957) 353 U.S. 920, 1 L.Ed (2d) 718, 77 S. Ct. 682; Deen v. Gulf, C. & S. F. R. Co. (1957) 353 U.S. 925, 1 L.Ed (2d) 721, 77 S. Ct. 715; Thomson v. Texas & Pac. R. Co. (1957) 353 U.S. 926, 1 L.Ed (2d) 722,

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77 S. Ct. 698; Arnold v. Panhandle & S. F. R. Co. (1957) 353 U.S. 360, 1 L.Ed (2d) 889, 77 S. Ct. 840; Ringhiser v. Chesapeake & O. R. Co. (1957) 354 U.S. 901, 1 L. Ed (2d) 1286, 77 S. Ct. 1093; McBride v. Toledo Terminal R. Co. (1957) 354 U.S. 517, 1 L.Ed (2d) 1534, 77 S. Ct. 1398; Gibson v. Thompson (1957) 355 U.S. 18, 2 L.Ed (2d) 1, 78 S. Ct. 2; Honeycutt v. Wabash R. Co. (1958) 355 U.S. 424, 2 L.Ed (2d) 380, 78 S. Ct. 393; Ferguson v. St. Louis-San Francisco R. Co. (1958) 356 U.S. 41, 2 L.Ed (2d) 571, 78 S. Ct. 671; Butler v. Whitman (1958) 356 U.S. 271, 2 L.Ed (2d) 754, 78 S. Ct. 734; Moore v. Terminal R.R. Assn. (1958) 358 U.S. 31, 3 L.Ed (2d) 24, 79 S. Ct. 2; Harris v. Penn. R.R. Co. (1959) 361 U.S. 15, 4 L.Ed (2d) 1, 80 S. Ct. 22; Conner v. Butler (1959) 361 U.S. 29, 4 L.Ed (2d) 10, 80 S. Ct. 21; Sentilles v. Inter-Caribbean Shipping Corp. (1959) 361 U.S. 107, 4 L.Ed (2d) 142, 80 S. Ct. 173; Davis v. Virginian Railway Co. (1960) 361 U.S. 354, 4 L.Ed (2d) 366, 80 S. Ct. 387. Failure of the majority to refer to a single case since *Rogers* is significant, particularly in view of the authoritative suggestion that ". . . earlier cases . . . should be examined in the light of the Rogers and Webb cases." Anno. 4 L.Ed (2d) 1787 at Note 8. It is submitted that *Conner v. Butler*, supra, for instance, cannot be distinguished in principle.

Rather than considering the simple question upon which appellate judges are counseled to "fix their sights," the majority of the Court in the case at bar was apparently misled by a consideration of "insurer" liability. The plaintiff in this case has never claimed that the defendant was an insurer. The jury was expressly instructed upon the defendants own request (Def. Request No. 1, R. 23) that the defendant was not an insurer

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of plaintiff's safety (Instruction No. 10, R. 48). It is equally clear, however, that as a matter of law, the plaintiff is not an "insurer" of his own safety. In this connection the defendant itself effectively proved on cross examination of plaintiff that he did not anticipate and could not have foreseen the dangerous condition of the coil of wire as it hung upon the nail. Yet the effect of the decision of this Court effectively requires the plaintiff to assume the total burden of his loss.

Instead of deciding the case upon the tangent of insurer consideration — a theory not in issue in the case — it is submitted that the attention of the Court should focus on two simple questions:

1. Can this Court find as a matter of law that the coil of wrie was not in a position of tension as a trap as was necessarily found by the jury?

2. Can this Court find as a matter of law that a coil of wire hanging on a nail as a trap in a position of spring or tension was a safe piece of equipment?

An affirmative answer to either of these questions simply cannot withstand objective scrutiny.

The United State Supreme Court has repeatedly held that substitution of the judgment of an appellate court for that of a jury, rather than a determination as to whether the jury's theory could be supported on any reasonable basis, constitutes impairment of a federal right. Note 13, Rogers v. Mo. R.R. *supra* and the cases cited *supra,* beginning with Webb v. Ill. Cent. R.R. See opinion of Mr. Justice Douglas in Harris v. Penn. R.R. Co., *supra.*

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POINT II

THE COURT ERRED IN HOLDING THAT PLAINTIFF WAS NOT ENTITLED TO AN INSTRUCTION TO THE EFFECT THAT HE DID NOT ASSUME THE RISK OF EMPLOYER NEGLIGENCE.

The Court's discussion of the instruction on assumption of risk evidences unwarranted solicitude for the railroad company. Inasmuch as the holding that the judgment was not supported by competent evidence would have disposed of the case and no new trial would be possible if that theory prevails, the discussion of assumption of risk is pure dicta. It is a gratuity to the defendant.

The majority admits that the issue of assumption of risk may be raised by the evidence and inferences from the evidence as well as by pleadings. In such a case, says the majority, a "cautionary instruction" may be appropriate so that improper inferences may be "dispelled." There is no explanation in the opinion as to why this case falls outside that description.

The opinion of Mr. Justice Black in the case cited by the majority, Tiller v. Atlantic Coast Line R.R. (1943) 318 U.S. 54, 63 S. Ct. 444, 87 L.Ed 610, contains a resume of the history of the assumption of risk doctrine. Both historically and practically, the doctrine was intertwined with considerations contributory negligence. Originally the concepts were loosely interchangeable. In fact, the very reason for the adoption of the 1939 amendment was the insurmountable "difficulty in distinguishing between contributory negligence and assumption of risk" as a result of the "niceties if not the casuistries of distinguishing between (them)" (ibid. page 63, U.S. Reporter

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614, L.Ed). As a result of the amendment, it is now clear that an employee does not assume the risk of employer negligence. Prior refinements were discarded.

The majority's confidence in Mr. Justice Frankfurter's "coup" is misplaced. All that he said in its context, and leaving aside the professorial embellishments, was that an employee did not assume the risk of employer negligence. If in some other sense the term "assumption of risk" may be a "hazardous legal tool," how can it "create confusion" in the sense and context in which it was used by the trial court here:

> "You are instructed that at the time of the incident we are concerned with, both plaintiff and defendant were engaged in interstate commerce, and plaintiff's claim for recovery is therefore governed by the Federal Employers' Liability Act. This act provides in substance that every common carrier railroad shall be liable in damages to any employee who suffers injury while employed by such carrier, resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its appliances, machinery or equipment, except where the injury results solely from the negligence of the one so injured.
>
> "Any such employee shall not be held to have assumed the risks of his employment occasioned by such negligence.
>
> "In actions against such carrier, the fact that the injured employee may have been guilty of contributory negligence shall not bar recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence, if any, attributable to such employee.
>
> "Under this statute, the test of liability is simply whether the proofs justify with reason the conclusion

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that the negligence of the defendant employer played any part, even the slightest, in producing the injury for which damages are sought.

"If the injury is caused solely by the negligence of the employee, or if the defendant is not negligent, then, of course, no recovery may be had by said employee."

The defense in this case was in substance that the wire was hung with loose ends on a nail in accordance with accepted industry practice. Defendant asserted that the plaintiff negligence was the sole proximate cause of the accident. Plaintiff's position was that the coil was in a position of tension or spring with the ends locked among or beneath the strands so that when the weight was released from the ends of the coil, one of them flipped into plaintiff's eye.

The defendant requested that the Court give an instruction that the defendant was not an insurer. (Defendant's Requested Instructions 1 and 13, R. 23, 33; Court's Instruction No. 10, R. 48.) The Court instructed the jury in substance that if the coil of wire was hung in accordance with generally accepted practice, defendant could not be liable. How could the Court's instruction on the assumption of risk mean more in its context than this: "Plaintiff did not assume the risk of the use of the coil of wire if it was unsafe for ordinary use."

There was a careful, painstaking description of negligence, contributory negligence, proximate cause, and the Court explained to the jury that ". . . the law recognizes that injuries to an employee can occur during the course of his work without fault or negligence on the part of either the railroad or the employee.

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"If you believe from the evidence that Mr. Siciliano's injuries were caused by accident and without negligence on the part of the railroad, then you must return a verdict in favor of the railroad and against the plaintiff . . ." (Instr. No. 8, R. 46).

Thus the assumption of risk issue, at least insofar as it is intertwined with contributory negligence, was raised by defendant's evidence and the inference it claimed for its evidence. The instruction as given in its context cannot be said to be error, let alone be confusing.

Even, however, if we accept the majority's premise for the argument and assume that the issue was not raised here by evidence or inferences, the giving of the instruction can hardly be said to be prejudicial. Defendant requested, and the Court gave, presumably as a "cautionary instruction," Instruction No. 8 that ". . . the railroad company is not an insurer of the safety of its employees." How did that issue become relevant? Who placed it in the case? Plaintiff has never claimed, either directly or by inference, that defendant was an insurer.

If the defendant is entitled to have an instruction that it is not an insurer, a straw man issue which it invented itself, how does it become prejudicial for plaintiff to have a "cautionary instruction" that plaintiff does not assume the risk of defendant's negligence?

The United States Supreme Court has never ruled that the plaintiff is not entitled to instruction along the lines of that given here. In Tiller v. Atlantic *supra* the ruling was that the *defendant* was not entitled to an instruction that plaintiff

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assumed a risk of employment, and in Texas & Pac. R.R. v. Buckles CCA 5 (1956) 232 F (2d) 257, the other federal case cited by the majority opinion in the case at bar, the ruling was the *defendant* was not entitled to an instruction that plaintiff assumed any risk of employment. It does not follow that a *plaintiff* is not entiled to a suitable instruction that he does not assume the risk of employer negligence. In fact, in the Texas & Pac. R.R. case, *supra,* which the majority says applies the Frankfurter language, the following instruction was held "clearly correct" (p. 263, Note 13):

> "We now instruct you on the question of assumption of risk. In any suit brought against a railroad under this law to recover damages for injury to an employee, such employee does not assume any of the risks of his employment in any case where the injury resulted, in whole or in part, from the negligence of any of the agents or employees of the railroad."

The Seventh Circuit has ruled twice that the giving of an instruction similar to that given in the case at bar at the request of an employee was not erroneous. Larsen v. Chicago and N.W. R. Co. (1948) CAA 7, 171 F (2d) 841, 846; Wantland v. Illinois Central R.R. Co. (1956) CCA 7, 237 F (2d) 921, 926. In the latter case the Court stated:

> "The Railroad also insists that the trial court erred in instructing the jury that the Federal Employers Liability Act provides that an employee shall not be held to have assumed the risk of his employment. This court had occasion to pass on a similar contention in Larsen v. Chicago & N.W.R. Co., 7 Cir. 171 F. 2d 841, 846, where it was held that such an instruction was not erroneous."

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The opinion of the majority here upon the instruction in question is squarely opposed to the opinions of two circuit courts. Rights under a federal statute being in issue, the Federal Rules should prevail. Moreover, the holding of the Fifth Circuit in the Texas & Pac. R.R. case relied upon by the majority is squarely against it. The Supreme Court denied certiorari in that case. (1955) 351 U.S. 984, 100 LEd. 1498, 76 S. Ct. 1052.

The judgment herein dated August 24 should be reversed; the opinion should be withdrawn. The judgment of the District Court should be reinstated and affirmed.

Respectfully submitted,

CLARENCE M. BECK
Felt Building
Salt Lake City, Utah

and

GEORGE M. McMILLAN
1020 Kearns Building
Salt Lake City, Utah

Attorneys for Petitioner

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